

*File*

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

LYDIG CONSTRUCTION, INC.,	)	
	)	
Appellant,	)	
	)	PCHB NO. 88-21
v.	)	
	)	
OLYMPIC AIR POLLUTION CONTROL	)	FINAL FINDINGS OF FACT,
AUTHORITY,	)	CONCLUSIONS OF LAW
	)	AND ORDER
Respondent.	)	

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This matter, the appeal of a Notice of Civil Penalty Assessment imposing a fine of \$100 for allegedly maintaining an open fire containing prohibited material came on for hearing before the Pollution Control Hearings Board on April 1, 1988 at the Board's offices in Lacey, Washington. Wick Dufford presided. Lawrence J. Faulk and Judith A. Bendor have reviewed the record. Pursuant to the request of respondent, the hearing was a formal one.

David L. Hall, project manager for Lydig Construction represented appellant. Respondent Olympia Air Pollution Control Authority (OAPCA) was represented by its attorney, Fred D. Gentry. The proceedings were recorded by Eugene Barker and Associates.

1        Witnesses were sworn and testified. Exhibits were examined. From  
2 the testimony heard and exhibits examined, the Board makes these

3                                FINDINGS OF FACT

4    I

5        Respondent OAPCA is an activated air pollution control authority  
6 with responsibility for conducting a program of air pollution  
7 prevention and control in a multi-county area including Thurston  
8 County and the City of Olympia.

9    II

10        Lydig Construction is a contractor, headquartered in Spokane,  
11 Washington, which during the month of January 1988, was conducting a  
12 job for the State Department of Transportation in Olympia, Washington,  
13 involving, among other things, open burning.

14    III

15        The site of the burning was near the railroad trestle and the  
16 freeway overpass on Henderson Boulevard. The site is behind some City  
17 shops on land owned by the City of Olympia. Lydig had permission from  
18 the City to burn there.

19    IV

20        On December 31, 1987, Lydig obtained an open burning permit for  
21 the site in question, issued jointly by the Olympia Fire Department  
22 and OAPCA. The permit authorized burning during the month of January  
23 1988, limited to natural vegetation only. Among the express conditions  
24

25  
26        FINAL FINDINGS OF FACT,  
27        CONCLUSIONS OF LAW & ORDER  
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1 of the permit were: 1) that a person must be in attendance at all  
2 times, and 2) that no material be burned containing "asphalt,  
3 petroleum products, paint, rubber products, plastic, or any substance  
4 which normally emits dense smoke or obnoxious odors."

5 V

6 On January 7, 1988, an OAPCA inspector proceeded to the site of  
7 Lydig's burning in response to a telephone complaint about dense smoke  
8 and "creosote" smell.

9 Arriving on the scene at about 9:00 a.m., the inspector observed a  
10 smoldering pile of material, primarily vegetation but containing in  
11 addition, plastic sheeting and rubber products. He took pictures  
12 documenting the presence of these materials in the burning pile.

13 VI

14 While on the scene the inspector made contact with Lydig's project  
15 manager and advised him what he had observed. The project manager  
16 asserted that Lydig was not responsible for putting the plastics and  
17 rubber into the burn pile. The inspector then observed a dumpster of  
18 the City of Olympia dump a load of materials on an adjacent pile. The  
19 material dumped appeared to be a load of Christmas trees.

20 VII

21 Lydig's project manager testified that he obtained the burning  
22 permit and contacted OAPCA every day about burning hours, according to  
23 the permit's terms. He stated that the fire department inspected the  
24

1 burn piles prior to burning and confirmed that they were the proper  
2 size and in the proper location.

3 He said that Lydig put nothing in the burn piles but natural  
4 vegetation. However, he said he did see City vehicles dumping  
5 Christmans trees on the piles. He did not think the City was  
6 segregating the trees from other materials they were picking up at the  
7 time.

8 He insisted that he had no control over the City's actions and was  
9 in no position to stop the City from using its own property as it  
10 wished. He said the City trucks were coming and going at all hours.  
11 He did not notice plastics or rubber products being dumped.

#### 12 VIII

13 Lydig's burning was carried on for several days. The fire was  
14 allowed to burn out each day and then built up again the next  
15 morning. January 7, 1988, was their last day of burning.

16 Lydig's employees did not report to the project manager that the  
17 plastics and rubber were in the burn pile. Before building up the  
18 fire each day no attempt was made to look beneath the surface of the  
19 dumped material to see what was there. Lydig's project manager  
20 asserted that the burn piles would not have been lit if the plastics  
21 and rubber had been visible at the time of lighting.

#### 22 IX

23 The Notice of Assessment of Civil Penalty was issued on  
24  
25

1 February 25, 1988. The appeal was filed on February 29, 1988. Lydig  
2 has no record of any prior open burning violations.

3 X

4 Any Conclusion of Law which is deemed a Finding of Fact is hereby  
5 adopted as such.

6 From these Findings, the Board makes the following

7 CONCLUSIONS OF LAW

8 I

9 The Board has jurisdiction over these parties and these matters,  
10 Chapters 43.21B RCW and 70.94 RCW.

11 II

12 The Washington Clean Air Act authorizes the imposition of civil  
13 penalties on a strict liability basis for violations of any  
14 regulations implementing the statute. RCW 70.94.431.

15 There is an express statutory prohibition of burning "asphalt,  
16 petroleum products, paints, rubber products, plastic or any substance  
17 other than natural vegetation which normally emits dense smoke or  
18 obnoxious odors." RCW 79.94.745. OAPCA's Regulation I, Section  
19 9.01(5), implements this statutory prohibition.

20 III

21 We conclude that Lydig Construction, Inc., violated Section  
22 9.01(5) on January 7, 1988, when it conducted an open fire containing  
23 plastics and rubber products, contrary to the terms of its burning  
24 permit. It is not a question of who put the materials in the pile,  
25

26 FINAL FINDINGS OF FACT,  
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27 PCHB NO. 88-21

1 but of who is responsible for the fire. See Cummings v. DOE, PCHB  
2 No. 85-89 (1985). The permit implicitly imposes a duty to inspect the  
3 burn pile each day, to be aware of what's there, and not to burn  
4 prohibited material.

5  
6 IV

7 Lydig maintains that, under the circumstances, it is unfair to  
8 penalize them. They assert it was impractical to take the burn pile  
9 apart each day, and that the fine makes them responsible for the sins  
10 of the City of Olympia.

11 V

12 We are not convinced that Lydig had no alternative but to burn  
13 whatever the City dumped on their burn pile. The maximum penalty  
14 possible, under OAPCA regulations was \$1,000. Only \$100 was  
15 assessed. This lower amount reflects the fact that Lydig had no prior  
16 violations. Under all the facts and circumstances, we conclude the  
17 penalty was appropriate.

18 VI

19 Any Conclusion of Law which is deemed a Finding of Fact is adopted  
20 as such.

21 From these Conclusions, the Board enters the following  
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23  
24  
25

ORDER

The violation and penalty are AFFIRMED

DONE this 18th day of Nov, 1988.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford  
WICK DUFFORD, Presiding

Lawrence J. Faulk 5/15/88  
LAWRENCE J. FAULK, Member

Judith A. Bendor  
JUDITH A. BENDOR, Member

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